In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 985

ROBERT F. BRUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed petitioner's conviction without opinion.

JURISDICTION

The *per curiam* judgment of the court of appeals was entered on August 14, 1967. A petition for rehearing *en banc* was denied on November 3, 1967. The Chief Justice extended the time for filing a petition for a writ of certiorari to January 2, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

289-224—68

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying a continuance so that petitioner could obtain other counsel.

2. Whether evidence as to slogans shouted by petitioner and a Nazi flag thrown by him onto the floor of the House of Representatives was properly admitted at his trial for assaulting the police officer who had arrested him for that conduct.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of assaulting a police officer in the performance of his official duties (22 D.C. Code 505(a)). On June 10, 1966, he was sentenced to imprisonment for from four months to one year and one day.

The evidence, the sufficiency of which is not challenged, showed that on September 24, 1965, while petitioner was in the front row of the House of Representatives public gallery, he stood up during a debate and began shouting various slogans such as "Down with home rule" and "Home rule is racial suicide." As police officers approached, he threw leaflets and a flag with a Nazi insignia onto the floor of the House. The first officer who reached petitioner announced his office, told petitioner that he was under arrest, and put his hand on petitioner's shoulder. Petitioner turned and struck the officer in the chest with his fist. Other officers then arrived and helped subdue petitioner (Tr.

11–12, 14–15, 27, 32–33).[1] Petitioner denied having assaulted the officer (Tr. 43).

Petitioner was indicted on the present charge on March 7, 1966. He was arraigned on March 18, 1966, at which time the district judge appointed counsel to represent him and set the trial for April 19, 1966.[2] Petitioner was in jail in default of bond. On the trial date, April 19, petitioner appeared for trial with his court-appointed counsel and both parties announced they were "ready" (Tr. 3; Pet. App. B–1). Petitioner thereupon asked if he could approach the bench. He was told to "[s]end [his] counsel up" (*ibid.*). Defense counsel, after conferring with petitioner, informed the court that petitioner wished the court to read a certain letter (Pet. App. B–1). This was a letter, dated April 8, 1966, from one Charles Gould, Jr., an attorney in Miami, who had been requested by petitioner to represent him. Mr. Gould's letter stated that he would represent petitioner himself "if all efforts fail to obtain a local attorney." He suggested that petitioner show the letter to the judge on April 19, 1966, "as evidence that you are attempting to obtain counsel," and advised petitioner to request a continuance of "at least sixty (60) days so that there will be plenty of time to prepare your defense" to the assault charge (Pet. App. A). The court, after reading the

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

[2] Petitioner's court-appointed counsel was the same attorney who had represented petitioner at his preliminary hearing on November 30, 1965, which resulted in an order that he be held on $1,000 bond to await grand jury action on the present charge.

letter, stated: "We are not going to defer the trial. * * * [W]e cannot grant any continuances at this point" (Tr. 4; Pet. App. B–2).

ARGUMENT

1. Petitioner has framed the question presented broadly, in terms of whether a defendant must always be granted a continuance to permit his "chosen counsel" to appear (Pet. 8). He contends (Pet. 7–13) that his Fifth and Sixth Amendment rights were violated because he did not have the same opportunity to be represented by counsel of his choice as a non-indigent would have been afforded. It is apparent, however, that the issue here is rather the narrow one of whether the trial judge abused his discretion in denying the request for a continuance under the circumstances. As the court of appeals below impliedly determined, there was no abuse of discretion in denying petitioner a continuance here.

Contrary to petitioner's assumption, he was not in the position of having a chosen attorney available to represent him. Compare *Reynolds* v. *Cochran,* 365 U.S. 525. Mr. Gould's letter was an offer to represent petitioner only "if all efforts fail to obtain a local attorney" (Pet. App. A). It seems evident from the letter that Mr. Gould was unaware that local counsel had already been appointed for petitioner. In any event, it is clear that Mr. Gould was making no firm commitment to petitioner with regard to representation at the time the trial was scheduled to begin. In these circumstances, it was not an abuse of discretion for the trial judge to decline to order a continuance,

on the chance that a different arrangement regarding counsel might be worked out, where the matter was presented to him at the last possible moment and after both parties had announced their readiness to proceed to trial. See *Cleveland* v. *United States*, 322 F. 2d 401 (C.A.D.C.), certiorari denied, 375 U.S. 884.

Moreover, the court's desire to proceed with the prompt trial of a defendant held in default of bond whose counsel, appointed a month before, was ready for trial is certainly understandable. Petitioner at no time sought to repudiate his appointed counsel. He makes no claim of faulty representation by such counsel or of any prejudice resulting from the court's denial of the requested delay. In these circumstances, the sweeping constitutional issues which petitioner seeks to raise are simply not presented. There is thus no occasion to upset his conviction or for further review of the trial judge's exercise of discretion in this regard.

2. Petitioner's contention (Pet. 14–15) that what he shouted and the flag that he threw onto the floor of the House of Representatives immediately preceding his arrest should not have been admitted into evidence is without merit. No objection was made at trial to the introduction of either item. Indeed, petitioner's counsel stated affirmatively that he had no objection to the admission of the flag (Tr. 37) or a pair of handcuffs with which petitioner had tried to attach himself to the gallery railing.[3] Moreover, the evidence was rele-

[3] Government counsel, at a bench conference, had agreed not to seek introduction of the pamphlets thrown by petitioner, since they were "very racial" in nature (Tr. 16).

vant to show petitioner's state of mind at the time of his arrest, and thus shed light on the contested issue whether he had struck the arresting officer. The evidence was thus properly admitted as relevant to the issue of guilt and as part of the *res gestae*. See *Scales* v. *United States*, 367 U.S. 203, 255–256; *Nunez* v. *United States*, 370 F. 2d 538 (C.A. 5). Finally, a determination as to whether allegedly inflammatory evidence should be kept from the jury has traditionally been regarded as lying within the trial court's discretion; only where the prejudicial effect significantly outweighs the probative value of the evidence is that discretion abused. *E.g.*, *Jarabo* v. *United States*, 158 F. 2d 509, 514 (C.A. 1); *Rivers* v. *United States*, 270 F. 2d 435, 437–439 (C.A. 9). There was no abuse of discretion in this regard here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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